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IN THE (2)

SUPREME COURT OF THE UNITED STATES

No. 85-1575

FRANCISCO A. H. RIVERA,

Petitioner,

v.

THE STATE OF ARIZONA and
ARIZONA DEPARTMENT OF ECONOMIC SECURITY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, State of Arizona respectfully requests that this Court deny the petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

QUESTION PRESENTED

Did the courts below properly conclude that the petitioner failed to establish his claim for discrimination?

PARTIES TO THE CASE

The parties to the case are petitioner, Francisco A.H. Rivera, the State of Arizona and the Arizona Department of Economic Security an agency of the State of Arizona.

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STATEMENT OF THE CASE

This case was tried without a jury in the United States District Court for the District of Arizona on July 17 and 20, 1984. Petitioner, Francisco A.H. Rivera filed a complaint in federal court on July 21, 1981, alleging that the State of Arizona and Arizona Department of Economic Security ("the State") discriminated against him based on his national origin, hispanic. Rivera sought relief under 42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended ("Title VII").

Thereafter, on November 4, 1981, an amended complaint was filed by Rivera seeking relief under additional civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985 and 1986. In his complaint, Rivera, an employee of the State Department of Economic Security in

Tucson, Arizona, alleged that the State discriminated against him by withholding promotions and advancements and compelling him to resign from his employment.[1/]

On November 25, 1983, the parties, represented by counsel, filed a joint pretrial order pursuant to F.R.C.P. 42(C). In that pretrial order, the only claim for relief was made pursuant to 42 U.S.C. § 2000e, et seq., and the only issue before the Court was whether Rivera's non-selection for a position of Acting Child Protective Services Supervisor constituted unlawful discrimination. An amended joint pretrial order

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[1/]The allegation of forced or "constructive resignation" is moot since the Petitioner, Francisco Rivera, did not resign and has been continuously employed by the Arizona Department of Economic Security from November 19, 1975, to the present.

was filed on July 11, 1984, adding additional witnesses. The issue before the Court, however, remained the same.

A two day evidentiary trial took place. Thereafter, on August 8, 1984, the Court issued Findings of Fact, Conclusions of Law and Order, ruling in favor of the State on the issue presented at trial. Judgment was entered in favor of the State and awarded the State its costs on August 9, 1984.

A Notice of Appeal was filed on August 9, 1984. On August 28, 1984, Rivera filed a Motion for Rehearing. That Motion was denied, following oral argument, on September 24, 1984. On October 2, 1984, Rivera filed an Amended Notice of Appeal.

On August 28, 1985 the United States Court of Appeals, for the Ninth Circuit, rendered its memorandum

decision dismissing petitioner's appeal. A motion for rehearing and/or a rehe .ing en banc was denied on December 4, 1985.

A petition for a Writ of Certiorari was filed on March 2, 1986.

JURISDICTION AND TIMELINESS

Jurisdiction below was based upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., which vests exclusive jurisdiction over Title VII litigation in federal courts. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 2101.

STATEMENT OF FACTS

This appeal challenges the decision of the District Court of Arizona and the Court of Appeals for the Ninth Circuit that Rivera failed to establish that he was discriminated against due to his national origin, hispanic, in

violation of 42 U.S.C. § 2000e et seq., Title VII, of the Civil Rights Act of 1964, as amended, when he was not selected for a promotional position by the Arizona State Department of Economic Security.

In all proceedings, except the appeal Rivera was represented by counsel. At trial, Rivera's counsel attempted to elicit testimony concerning alleged retaliatory treatment of Rivera. The Judge sustained the State's objection to testimony concerning retaliation on the grounds that this issue was not pleaded, it was not stated as an issue in the pretrial order, nor was it identified as an issue prior to trial. At no time did Rivera's counsel move to amend the complaint pursuant to Rule 15, Federal Rules of Civil Procedure, to include a claim of retaliation.

At the conclusion of the trial,

after examination and cross-examination of witnesses, the matter was taken under advisement by the Court. Thereafter, judgment for the State was entered on August 8, 1984.

REASONS FOR DENYING THE WRIT

1. Petitioner's Arguments Address Questions of Evidence and Seek Only Evidentiary Review.

Ordinarily the Supreme Court does not grant certiorari to review evidence or inferences drawn from them by the courts below. General Talking Pictures Corp. v. Western Electric, 304 U.S. 175, 82 L.Ed. 1274, 58 S.Ct. 849.

As aptly stated by this Court in NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 503 95 L.Ed. 479, 482, 483 71 S.Ct. 453, 456 (1951):

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it

> tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations".

Similarly in the case at bar there are no unique issues compelling this court to assume jurisdiction. This court should adhere to the above rules and not review the evidence, evaluate testimony or substitute its judgment for that of the Ninth Circuit. This is merely a simple case where the courts below weighed the evidence and found against the petitioner. This court should not disturb this finding.

2. Rejection of Petitioner's Small Sample Was in Conformity With Prior Decisions of This Court.

Petitioner's arguments were considered and rejected by the courts below. The statistical evidence offered by Rivera, consisting of a six person sample, was found to be insufficient to establish discriminatory intent.

The Courts have consistently recognized that statistical evidence of discrimination based on but a few numbers is not, standing alone, compelling evidence of wrongdoing. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974); Scott v. Pacific Maritime Ass'n, 695 F.2d 1199, 1207 (9th Cir. 1983); Morita v. Southern California Permanente Medical Group, 541 F.2d 217, 220 (9th Cir. 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 761, 50 L.Ed.2d 765 (1977); Ingram v. Madison Square Garden Center, Inc., 709 F.2d 807, 810 (2nd Cir. 1983).

The finding of the Ninth Circuit is clearly consistent with these holdings.

3. The Ninth Circuit's Rejection of Petitioner's Retaliation Claim Because it was not Included in the Pre-trial Order was not in Conflict With Other Decisions of the Courts of Appeals.

Petitioner's retaliation claim was similarly rejected by the Ninth Circuit because of his failure to include that issue in the pre-trial order.

This exclusion of contentions or evidence not listed or disclosed in the pretrial order has been repeatedly upheld. United States v. First Nat. Bank of Circle, 652 F.2d 882 (9th Cir. 1981); Colvin v. U.S. for Use and Benefit of Magini, etc., 549 F.2d 1338, 1340 (9th Cir. 1977); Federal Deposit Insurance Corp. v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971); Morgan v. Commercial Union Assurance Co., 606 F.2d

554, 556 (5th Cir. 1979); Lirette v. Popich Bros. Water Transport Inc., 660 F.2d 142, 144-145 (5th Cir. 1981); Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982).

Accordingly, the Ninth Circuit did not err in rejecting Rivera's retaliation claim, which was not stated in the pretrial order.

4. The Ninth Circuit Did Not Err When it Determined That the Testimony of the State's Witnesses was Credible.

Removing the gloss from petitioner's third argument of "pretext" is the basic argument of credibility.

Rivera argues that the courts below erred in giving credence to the testimony of the State's witnesses, over his own witnesses.

Clearly, judgments of credibility and the resolution of conflicting inferences are peculiarly within the

province of the courts below and will not be disturbed by the Supreme Court, Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193 (1927).

In short, Rivera has failed to demonstrate that the evaluation of the evidence by the Ninth Circuit or the assessment of the credibility of his testimony and that of other witnesses was clearly erroneous and this Court should not disturb these findings.

CONCLUSION

The bottom line in Rivera's various arguments is that the findings of the courts below should be disregarded and his version of the facts, be accepted.

Since there are no substantial issues pursuant to Rule 17 of the Supreme Court rules, the Court should deny the Writ. The decision below is

neither in conflict with another Court of Appeal or this Court, nor is there any question of federal law which has not been and should be settled by the Supreme Court, nor did the judicial pro ɔedings below not comply with standard procedures. The decisions below were based on the facts presented and has no effect on other litigants. Petitioner had his day in court and failed to convince the trial court of the merits of his claim. No split in the Courts of Appeals exists as to any of the arguments proffered by petitioner nor do any of the rulings below conflict with any decision of the Supreme Court. None of the findings of fact made by the courts below are clearly erroneous and this Court should not disturb these findings.

For the above reasons, the Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17th day of April, 1986.

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